IN THE

Supreme Court of the United States

October Term, 1945.

No.

JOSEPH ALCIDE LANDRY, *Petitioner*,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The majority and dissenting opinions in the Circuit Court of Appeals (R. 91) are reported in 148 F. (2d) 699. The opinions of the District Court (R. 12, 70) are reported in 54 F. Supp. 356 and 56 F. Supp. 156.

Jurisdiction.

As stated in the petition, the jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. The judgment of the Circuit Court of Appeals denying the petition for rehearing was entered May 15, 1945 (R. 111).

Statement of the Case.

The petitioner, Joseph Alcide Landry, is the holder of a life insurance policy (R. 57-65) with the Mutual Life In-

surance Company of New York, issued September 12, 1929, in the amount of $5,000 and all premiums which have become due on the policy have been paid. The policy contains a provision for payment of benefits in the event of total and permanent disability prior to attaining the age of sixty years. The petitioner became sixty years of age on August 4, 1942; prior thereto and particularly during the month of May 1938, he became totally and permanently disabled from performing his work as a farm operator, which fact is not contested by the insurance company.

Due to his want of realization that his policy contained such disability provisions, Landry did not notify the insurance company of his disability until March 1943, soon after he realized that he was entitled to such benefits; thus, the first notice of disability was given about seven months after petitioner had attained the age of sixty years. The insurance company did not have petitioner examined but disclaimed liability on the ground that no right of action existed because petitioner had failed to file proof of claim before attaining the age of sixty years (R. 66-67). When suit was instituted the insurance company filed a motion to dismiss on the ground that the petitioner had no right of action for the reason just stated; this exception was argued and the District Court in a written opinion (R. 12; 54 F. Supp. 356) overruled the motion to dismiss and held that the language of the disability provision was clear and unambiguous and that it was not a requirement of the policy that proof of claim be filed before attaining the age of sixty years.

When the case was tried on the merits the insurance company did not contest the total and permanent disability of the petitioner and judgment was rendered for the amount of disability benefits accrued since May 1938, but denying the application of the statutory penalties (R. 77; see also, 56 F. Supp. 156).

The pertinent provisions of the policy relative to disability benefits are reproduced below. From the front page of the policy (R. 57) we quote:

> "and if the insured is totally and presumably permanently disabled before age 60, will pay to the insured $50.00 monthly during such disability, increasing after five and ten years continuous disability, besides waiving premium payments, all upon the conditions set forth in Section 3."

From page 2 of the policy (R. 59):

> "SECTION 3. BENEFITS IN EVENT OF TOTAL AND PERMANENT DISABILITY BEFORE AGE 60.
>
> "TOTAL DISABILITY.—Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the Insured to follow a gainful occupation.
>
> "PERMANENT DISABILITY.—Total disability shall, during its continuance, be presumed to be permanent;
>
> "(a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of the Insured; or
>
> "(b) If such disability has existed continuously for ninety days.
>
> "WHEN BENEFITS BECOME EFFECTIVE.—If, before attaining the age of sixty years and while no premium on this Policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the Insured so long as such disability continues.
>
> "BENEFITS. (a) INCREASING INCOME.—The Company will pay a monthly income to the Insured of the amount stated on the first page hereof ($10 per $1,000 face amount of Policy), beginning upon receipt of due proof of such disability and increasing after sixty consecutive months payments have been made to one and one-half times such amount and after sixty further consecutive monthly payments have been made to twice such

amount at which it shall remain while total and permanent disability continues.

(b) WAIVER OF PREMIUM.—The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability."

There is a rider or a supplementary clause which appears on the back of the policy (R. 65) which reads as follows:

"SUPPLEMENTARY BENEFITS TO SECTION ENTITLED 'BENEFITS IN EVENT OF TOTAL AND PERMANENT DISABILITY BEFORE AGE 60.'

"BENEFITS IF PROOF DELAYED AND NO PREMIUM IN DEFAULT. If, while no premium is in default, the proof furnished the Company under the section providing for 'Benefits in Event of Total and Permanent Disability Before Age 60' is such as to entitle the Insured to the Disability Benefits provided for therein, and if due proof is also furnished the Company that such disability has been continuous since its beginning, the Company will:

"(a) Begin the monthly income payments provided for in such section as of the end of the first completed month of such disability if earlier than the date of receipt of such proof instead of as of the date of receipt of such proof, and,

"(b) Return any premium due after the beginning of such disability which has been paid during the continuance thereof.

"BENEFITS IF PREMIUM IN DEFAULT NOT OVER SIX MONTHS. If, not later than six months after the due date of any premium in default and provided no previously due premium is also in default, DUE PROOF IS RECEIVED BY THE COMPANY BEFORE THE INSURED SHALL HAVE ATTAINED THE AGE OF SIXTY YEARS that the insured was totally and permanently disabled, as defined in the section entled 'Benefits in Event of Total and Permanent Disability Before Age 60,' at the date when such premium in default fell due, and has been continuously so disabled since said due date, the Policy will be rein-

stated without evidence of insurability and the waiver of premium and disability income benefits shall be the same as if such default had not occurred." (Capitalization ours)

There is no other provision in the policy as to the time when proof of claim must be filed and there is no forfeiture clause for failure to file claim within any stated time.

The insurance company appealed from the judgment to the United States Circuit Court of Appeals for the Fifth Circuit, without contesting the fact of disability; and in so far as its appeal is concerned, which is the only issue covered in the petition for a writ of certiorari, the question to be decided is whether or not the language of the disability clause, including the rider, makes the filing of proof of claim before the insured reached the age of 60 years a condition precedent to recovery.

Petitioner appealed from the portion of the judgment of the District Court denying the statutory penalties, but has subsequently abandoned his cross-appeal (R. 99).

Specification of Errors.

(1) The Circuit Court of Appeals erred in holding that under the provisions of the policy proof of claim of disability must be filed prior to attaining the age of 60 years.

(2) The Circuit Court of Appeals (R. 95) erred in holding that the weight of authority in the interpretation of the disability clause involved is in favor of the construction urged by the insurance company.

(3) The Circuit Court of Appeals erred in holding that the Supreme Court of Louisiana had adopted the interpretation urged by the insurance company.

(4) The Circuit Court of Appeals erred in failing to hold that the disability clause involved, in so far as it affects the petitioner's rights in this proceeding, is ambiguous, for the reason that the District Judge and one Circuit Judge

adopted the interpretation urged by the petitioner and the two Circuit Judges delivering the majority opinion held that the interpretation urged by the insurance company was correct.

ARGUMENT.

Petitioner contends that in the case of an insured whose premiums are fully paid, the language of the rider (R. 65) relieves him from complying with the requirement contained in Section 3 of the policy (R. 59) that the proof of claim of disability must be filed before attaining the age of 60 years. This was the position taken by Judge Porterie of the District Court. In the alternative the petitioner contends that the language of the entire disability clause, including the rider, with reference to the requirement of furnishing proof before attaining the age of 60, is so ambiguous that it must be construed in the manner most favorable to him. This was the position taken by Judge McCord of the Circuit Court of Appeals.

In view of the fact that the argument and the law applicable to the specification of errors numbers 1, 2 and 3 are so connected that they cannot be set up separately in the brief, these three specifications will be argued together.

Errors Nos. 1, 2 and 3. Language of Disability Clause is Clear and Insured Did Not Have to File Proof Before Attaining the Age of 60.

This particular disability provision of the Landry policy, including the two sections of the rider, has not been construed by any court in the United States, with regard to the right of an insured to file proof of claim for disability after he has attained the age of sixty years. So that while analogies can be drawn with decisions of other courts interpreting similar language, the final interpretation of this clause in the Landry policy is *res novo.*

There are two classes of disability provisions which differ basically with reference to the incipiency of liability when

an insured becomes totally and permanently disabled. The leading case clearly defining these two classes of provisions is *Mutual Life Ins. Co. of New York* v. *Drummond*, 111 F. (2d) 282 (C. C. A., 8th). The disability clause of the policy presented for interpretation was the same as that which is contained in the Landry policy. We quote the following from the opinion:

> "Generally speaking, there are two classes of disability clauses: One, those in which benefits are conditioned upon the furnishing of proof and are to commence from the time that proofs are furnished; and two, those in which benefits are conditioned upon the furnishing of proof, but which provide that the benefits are to commence from the date that the disability occurs. Under a clause of the first class, the furnishing of proof is a condition precedent to liability, and the right of the insured to the benefits provided does not accrue until proofs are furnished. Under a clause of the second class the occurrence of the disability is ordinarily held to be the event which creates the rights of the insured to the benefits promised in the policy, and the furnishing of proofs by the insured to the company is only a prerequisite to the actual receipt of such benefits.
>
> "The policy in suit, in the absence of the rider, had a disability clause of the first class because the benefits provided for were to commence only with the furnishing of proof. The addition of the rider, however, brought the disability clause of the policy within the second class, in which the right of the insured to the disability benefits accrues as of the date of disability." (111 F. (2d), at p. 285)

Since the Landry policy contained the identical disability clause we submit that when he became totally and permanently disabled in May 1938, the liability of the defendant attached as of that time. The question, therefore, for the Court to determine is whether or not Landry forfeited his rights to benefits which had already accrued in

his favor by failing, through ignorance, to file proof of claim before he had attained the age of sixty years.

It is argued that the requirement of furnishing proof of claim before attaining the age of sixty in this case goes to "the very question of coverage" under the policy. This statement is erroneous; in this instance the insurance company overlooks the well accepted doctrine defined in *Mutual Life Ins. Co. of New York* v. *Drummond, supra.* This rule is recognized in the case of *Lincoln Natl. Life Ins. Co.* v. *Ghio,* 111 F. (2d) 307 (C. C. A., 8th).

It is held in the Drummond case that under policies of the Mutual Life containing only Section 3 (disability clause), without the rider, liability on the part of the company does not begin until proof of claim of disability is furnished; while under policies of that company containing Section 3 and the rider, which entitles the insured to retroactive monthly payments from the date of disability, the liability of the company begins on the date of disability, and only the payments are postponed until proof is furnished. In other words, the coverage of the Landry policy is that the Mutual Life becomes liable at the time that the insured becomes totally and permanently disabled before attaining the age of sixty years. The policy's coverage in this case is that stated on the front page thereof as follows:

> "If the insured is totally and presumably permanently disabled before age 60 [the company] will pay the insured $50.00 monthly, etc." (R. 57)

Thus, this case does not present the issue of coverage because the insurance company became obligated to Landry for monthly benefits in May 1938. The insurance company would not deny that if Landry had filed proof of claim in July 1942, just before attaining 60, he would have received his monthly payments which had accrued since May 1938.

This case brings up the issue of the forfeiture of a right which accrued to Landry in May 1938. In July 1942, Landry had to his credit, by virtue of the coverage of his policy,

approximately $2,500 in accrued benefits; the question therefore is whether he lost this $2,500 and the right to subsequent monthly payments by not filing proof before attaining the age of sixty years.

The law abhors forfeitures and one who claims forfeiture as a defense must show that the language of the contract upon which he relies is positive and unequivocal.

At the outset we direct the Court's attention to the two sections of the rider for the reason that the second section aids materially in construing the requirements to be met by Landry, whose premiums were not in default and who, therefore, comes under the operation of the first section.

On the face of the policy (R. 57) there is an outright obligation to pay certain monthly benefits to the policyholder if he becomes totally and permanently disabled before the age of sixty years.

Section 3 found on Page 2 of the policy (R. 59), quoted above, defines total and permanent disability, and then there appears the paragraph "When Benefits Become Effective." This particular clause, without reference to the rider, would indicate that the filing of proof of claim prior to attaining the age of sixty years is a condition precedent to recovery.

Then there is the rider printed on the back of the policy (R. 65) (quoted above) by which Section 3 is amended and supplemented. This rider gives supplementary benefits and is purposely intended to cover cases where the insured has delayed filing proof of claim; in fact, that is the very essence of the rider. It grants additional benefits and provides the manner in which they may be obtained. In providing for such additional benefits where proof has been delayed, this rider is divided into two sections as follows:

Benefits if Proof Delayed and no Premium in Default.
Benefits if Premium in Default Not Over Six Months.

For an insured to obtain disability benefits under Section 3 (without the rider) his proof of claim must have been filed (1) before he attained the age of sixty years, and (2) while no premium was in default.

Then we examine the rider (R. 65). Under the first section thereof we find that the only requirement as to the time when proof of claim is to be filed is that no premium shall be in default. Thus the provision which we had in Section 3 that such proof had to be filed before attaining the age of sixty years is eliminated from the first section. Under the second section, we find that there are three requirements as to time when proof of claim must be filed by an insured whose premiums are in default, namely: (1) The premiums must not be in default more than six months, (2) the premiums previously due must not be in default, and (3) the proof must be received by the company before the insured shall have attained the age of sixty years.

Thus the breaking up of the rider into two separate sections, one applicable to an insured whose "premiums are not in default," and the other applicable to insured whose "premiums are not in default more than six months" is significant and affords a guide in determining the rights of the petitioner. The first section, stipulating additional benefits for an insured who is in good standing, is more lenient, and affords a wider range of protection; and the second section dealing with one who is not in good standing with relation to payment of premiums, restricts his rights by prescribing that he must file proof of claim prior to attaining the age of sixty years.

If such conditions were intended to apply to one whose premiums are not in default the insurance company could very easily have inserted the same in the first section of the rider. It should be noted that the benefits which accrue to the insured under Section 1 and Section 2 of the rider are the same. The two sections differ only with respect to the conditions under which the two classes of insured persons may benefit under the terms of the rider. The only reasonable conclusion to draw is that stated by the District Court (R. 17) from which we quote:

> "Therefore, we hold it to be clear and unambiguous that such requirement is not essential and is not a con-

dition precedent to the application of the first paragraph—the one which applies to the facts of and, therefore, controls this case."

In support of our statement that allied clauses in a policy contract assist in the interpretation of policy provisions, see *Boyett* v. *United States*, 86 F. (2d) 66 (C. C. A., 5th).

Louisiana Civil Code, Art. 1955, reads as follows:

> "All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act."

The language in the first clause of the rider to the effect that the proof furnished must be such as to entitle the insured to the disability benefits provided in Section 3, refers solely to the quality or substance of the proof furnished, so that the proof will conform to the requirements for proving total and permanent disability as expressed in Section 3. This clause, we submit, has nothing to do with the time when the proof must be filed. To the contrary, the only requirement of the first section as to the time of filing proof is that there be no premium in default.

The insurance company argues that since Section 3 made it a condition precedent that proof of claim must be filed before attaining the age of sixty years, it was unnecessary to repeat this requirement in the rider. In answer to this, we say that the insertion of this requirement in the second portion of the rider indicates that it was necessary for the company to insert it also in the first, if it was the company's intention that the proof of claim by one who was not in default had to be filed before he attained the age of sixty years.

The insurance company will undoubtedly use the same argument in its brief to this Court as it used in the Circuit Court of Appeals; thus we deem it proper to quote the language which follows, in order that such argument may be rebutted at the present time. The argument was stated as

follows in the brief filed by counsel for the insurance company:

> "In the first paragraph these conditions embrace all conditions otherwise required, namely, that proof furnished the Company under the main section is such as to entitle the insured to disability benefits. There is no need here to specify what these conditions are. The statement is all inclusive and embraces the conditions stated in the main clause, including the one that proof must be furnished before sixty."
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> "The second paragraph obviously deals with a situation in which the premium is in default. Consequently, it was impossible to state the conditions in a generality, but the only previously stated condition which it was necessary to restate was that due proof be received by the company before age sixty. It would have been impossible to state the second paragraph in the same general language as was employed in the first paragraph. So stated, the clause would read as follows:
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> "'Benefits if Premium in Default not over Six Months.—If, not later than six months after the due date of any premium in default and provided no previously due premium is also in default, the proof furnished the Company under the section providing for "Benefits in Event of Total and Permanent Disability before age 60" is such as to entitle the Insured to the Disability Benefits provided for therein, * * *'
>
> "Manifestly such a provision would be a contradiction in terms. Proof furnished after default could never qualify as proof furnished the Company under the section providing for benefits in event of total and permanent disability before age 60, since a requirement of the main section is that proof be furnished 'while no premium on this policy is in default.'"

This clause which eliminates the specific statement of the requirement of filing proof before attaining the age of sixty, in the second portion of the rider, would not be a contradiction of prior provisions of the policy. The language in the first portion of the rider stating that "the proof must be such as to entitle the insured to the benefits provided

under Section 3 of the policy" refers to the quality, substance and sufficiency of the proof furnished. Similar language is used in the second portion of the rider and also refers to the quality, substance and sufficiency of the proof furnished under Section 3. Thus, if we are correct in this respect, the suggested draft of the second portion of the rider, without specific reference to the age requirement, is harmonious with the remaining portion of the disability clause.

The following language contained in counsel's suggested form, to wit:

> "if not later than six months after the due date of any payment in default"

would specifically qualify the requirement of Section 3 of the policy that proof of claim must be filed while no premium is in default. This would not creat any ambiguous situation as the language of the rider would control in that respect; then the language

> "the proof furnished the company under the section providing for 'Benefits in the Event of Total and Permanent Disability before age 60' is such as to entitle the insured to the disability benefits provided for therein"

would have the same meaning as it has in the first section of the rider.

In any event, language could have been found which would have clearly avoided the situation which exists in this case, and we urge our statement, which is truly a repetition at this time, that the inclusion of this specific requirement in the second portion of the rider, and the exclusion of the requirement in the first portion leads logically to an interpretation of the entire disability clause in accordance with the views which we present.

As previously stated herein no court in the United States has interpreted the whole of the disability clause contained in the Landry policy, including Section 3 of the Policy and

the rider with its two sections. We wish, however, to discuss a few cases in which language of disability clauses much less favorable to the insured, was held by various courts not to require the filing of proof of disability prior to attaining the age of sixty years, as a condition precedent for recovery.

In the case of *Smith* v. *Mutual Life Ins. Co.*, 69 S. W. (2d) 874 (Sup. Ct. of Ark.), the policy contained the following clause:

> "If the insured, after the payment of premiums for at least one full year shall, before attaining the age of sixty, and provided all past due payments have been duly paid and the policy is in full force, furnish due proof to the company at its home office whether (a) that he has become totally and permanently disabled, etc. * * *"

In that case the insured, having been disabled prior to attaining the age of sixty, did not file proof of claim until later and the Mutual Life Insurance Company made the defense that he had forfeited his rights under the terms of the policy. We quote the following language from that decision:

> "Neither can we agree that our present holding is in conflict with *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230, 231, 76 L. Ed. 416. The policy construed in the Bergholm Case contains the following language: '* * * * To entitle the Insured to the above Total and permanent Disability Benefits this policy at the time of making claim for such benefits must be in full force and all premiums becoming due prior to the time of making claim must have been duly paid * * *' The Supreme Court of the United States was eminently correct in holding that the language just quoted must be performed by the insured as a condition precedent to his right of recovery. This is the plain and unmistakable meaning of the language employed. Howeven, we have no such language in the policy of insurance here under consideration. We think the lan-

guage here employed is plain and definite to the effect that, if the insured suffers total and permanent disability prior to his sixtieth birthday and at the time has paid all premiums due, liability then and there attaches and recovery is postponed until notice or proof of loss is submitted. For instance, suppose the insured on the day prior to his sixtieth birthday suffers an injury which results in the loss of both legs and both arms. In the natural course of events it would be impossible to make proof of loss prior to the insured's sixtieth birthday. Such construction would nullify the plain intentions of the parties. True this is an extreme imaginary case, but it is not beyond the limits which the parties had in mind at the time the contract was effected.

"It is self-evident that the paramount consideration the parties had in mind at the execution of this contract was insurance against total and permanent disability. Any construction which nullifies this paramount consideration should be avoided, if possible. All courts agree that it is a fundamental rule of construction that insurance contracts when ambiguous should be construed most strongly against the insurer. *Mutual Life Ins. Co.* v. *Hurni Packing Co.*, 263 U. S. 167, 44 S. Ct. 90, 68 L. Ed. 235, 31 A. L. R. 102; *Stipcich* v. *Ins. Co.*, 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895."

In the case of *Mutual Life Ins. Co.* v. *Smith*, 79 S. W. (2d) 28 (Ky.) the policy contained the following disability clause:

"When Such Benefits Take Effect.—If the insured, after payment of premiums for at least one full year, provided all past due premius have been duly paid, shall before attaining the age of sixty years at nearest birthday and while this Policy is in full force furnish due proof to the Company at its Home Office that he has become totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain, or profit, or from following any gainful occupation, and that such disability has then existed continuously for not less

than sixty days, the Company will grant the following benefits."

In that case insured became totally and permanently disabled prior to attanining the age of sixty years, and did not file proof until two years after the age of sixty years. We quote the following from the opinion:

"The argument that Smith's delay of more than six years after the commencement of his disability and about two years after attaining the age of sixty, in furnishing proof of disability, was unreasonable as a matter of law, is neither authorized by any provision of the policies, nor by a reasonable construction thereof. They contain no requirement respecting the time of furnishing proof of disability.

"Neither of the words, 'immediately,' 'forthwith,' 'forfeiture,' nor the phrase 'condition precedent' is contained in them.

"The only language connoting a 'condition precedent' in this sentence, 'Benefits in the Event of Total and Permanent Disability Before Age Sixty,' which is only susceptible of the construction that the disability must occur before age sixty. The next sentence, 'When such benefits (benefit in the event of such disability before age sixty) take effect,' when read in connection with the language following it, to the average mind, naturally and inevitably, refers to the time of the commencement of the payment of 'the benefits' and not the time of the creation or commencement of the coverage of the insured's disability benefits, thereunder."

* * * * * * *

"If giving notice or furnishing proof is made a condition precedent to liability on the part of the insurer or if forfeiture is provided for if they are not given, then notice or proof must be given in accordance with the terms of the policy contract. *Staples* v. *Continental Ins. Co.*, 223 Ky. 842, 5 S. W. (2d) 265; *Federal Life Ins. Co.* v. *Holmes' Committee*, 232 Ky. 834, 24 S. W. (2d) 906. In the case of *Metropolitan Life Ins. Co.* v. *People's Trust Co.*, 177 Ind. 578, 98 N. E. 513, 41

L. R. A. (N. S.) 285, the court held that a delay of two years and two months in furnishing notice and proof of loss was not unreasonable in the circumstances established by the evidence. In the present case, it is very clear that Smith, after the occurring of his total and permanent disability, would not have continued to pay the premiums and omitted to demand of the Mutual Life the payment of the disability benefits except ignorance of the provisions of the policy entitling him thereto. The facts herein bring his rights within the rule stated in *Metropolitan Life Ins. Co.* v. *People's Trust Co., supra.*"

In the case of *Viles* v. *Prudential Ins. Co.*, 96 F. (2d) 3 (C. C. A., 10th), under a clause similar to that contained in the Landry policy, and with a similar rider, the court held that the insured was entitled to disability benefits even though he had not filed proof before defaulting in his premiums.

A contract of insurance is to be considered and construed as a whole and all its parts so far as practicable are to be harmonized and given force and effect, and, if provisions in the policy proper and those in the rider or supplement are in conflict or inconsistent with each other, those of the latter must govern. *Wagner Electric Corp.* v. *Ocean Accident & Guarantee Corp.*, 36 F. (2d) 186 (C. C. A., 8th).

We assume that counsel for the insurance company will use as his main authorities in support of his interpretation of the disability clause of the Landry policy, the case of *Birnbaum* v. *Mutual Life Ins. Co. of New York*, 170 Misc. 83, 9 N. Y. S. 2d 928, and the case of *Moscov* v. *Mutual Life Ins. Co. of New York*, 387 Ill. 378, 56 N. E. 2nd 399.

The Birnbaum case was decided by the City Court of New York, County of Bronx, and there is no record of the case having been appealed. It does not constitute a guide to the construction of the disability clause of the Landry policy for two reasons: (1) The rider which was on the back of the Mutual Life policy in the Birnbaum case did not

contain the second section such as we find in the Landry policy, and which contributes so much towards the proper interpretation of the rights of the claimant under the first section of the rider and (2) it is an ill-considered decision without reasons supporting its conclusion.

In an attempt to vest prestige in the Birnbaum case, counsel for the insurance company will probably call to the Court's attention the fact that the decision was cited in the cases of *Lincoln Natl. Ins. Co.* v. *Ghio,* 111 F. (2nd) 307 (C. C. A., 8th), and *Mutual Life Ins. Co.* v. *Drummond,* 111 F. (2d) 282-286 (C. C. A., 8th). As pointed out by the District Judge in the present case (R. 21), the use of the Birnbaum case in the *Lincoln Natl. Ins. Co.* v. *Ghio* case was in a footnote for the purpose of comparison, and its use in the case of *Mutual Life Ins. Co.* v. *Drummond* was not in connection with the same question which is being considered in the Landry case.

The case of *Moscov* v. *Mutual Life Ins. Co. of New York, supra,* was decided by the Supreme Court of the State of Illinois, in line with the contention of the insurance company. The case is different from the Landry case in that, like the Birnbaum policy contract, the Moscov policy contract did not contain the second section of the rider such as is found in the Landry policy; the Supreme Court of Illinois did not construe the same language which is now presented in the Landry policy.

The cases of *Brumit* v. *Mutual Life Ins. Co.,* 178 Tenn. 48, 156 S. W. 2d, 377, and *Wolfe* v. *Mutual Life Ins. Co.,* 3 Tenn. Ap. 199, which will probably be cited by counsel for the insurance company, are inapplicable as the conditions in the contracts were not the same as in the instant case.

Summing up our reasoning as to the interpretation of the disability benefits of the Landry policy contract, we submit:

(1) There is no time limit for filing proof, nor is there a forfeiture.

(2) Section 3, page 2 of the policy (R. 59) required that proof be furnished before insured attained age of sixty.

(3) The rider on the backfold of the policy (R. 65) giving supplementary benefits when proof is delayed, is subdivided into two sections:

(a) When no premium in default.

(b) When premium in default not over six months.

In the first portion of the rider, the one applicable to Landry, who had paid all his premiums, the requirement of filing of proof before attaining age sixty is eliminated.

In the second portion of the rider applicable to an insured who is in default in premiums, the requirement of filing proof before attaining age sixty, is inserted.

(4) The exclusion of this requirement in the first portion of the rider and its inclusion in the second portion shows an intention that the filing of proof before age sixty by an insured in good standing is not a condition precedent to his right of recovery.

(5) Consequently Landry did not lose his rights to recover the benefits which had accrued to him since May 1938, by failing, through ignorance of his rights, to file claim until after he was over sixty years of age.

The Mutual Life Insurance Company wrote the policy; it saw fit to make the filing of proof before attaining the age of sixty a condition precedent to recovery in the case of policyholders who are in default, and not to make it a condition precedent in the case of policyholders whose premiums are all paid. Our interpretation gives full force to the obligation on the face of the policy to insure against disability occurring before age sixty.

Specification of Error No. 4. Language of Entire Disability Clause as it Affects Landry is at Least Ambiguous.

Petitioner submits that even if the interpretation in the majority opinion of the Circuit Court of Appeals is reasonable, nevertheless the court erred in failing to recognize that the language involved is susceptible of two reasonable interpretations and that accordingly it is ambiguous and should be construed in favor of the insured. The fact that Judge Porterie in two separate opinions (R. 12-33 and R. 70-77) handed down in the District Court and that Judge McCord in a dissenting opinion (R. 95) in the Circuit Court of Appeals decided that petitioner's contention is correct, furnishes proof of the fact that the language involved is susceptible of two reasonable interpretations and consequently is ambiguous. Another factor which shows the ambiguity of the clause is that in the case of *Moscov* v. *Mutual Life Ins. Co. of New York*, 387 Ill. 378, 56 N. E. 2nd 399, where only Section 3 of the policy and the first portion of the rider were presented for interpretation, two Judges of the Supreme Court of Illinois dissented from the majority opinion, which held that the insured was required to file proof before attaining the age of sixty.

"The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. * * * Examination of the words relied upon to show an exception to the Incontestability clause of the policy discloses ample doubt concerning their meaning. The arguments of counsel have emphasized the uncertainty. The District Court and the Circuit Court of Appeals reached different conclusions, and elsewhere there is diversity of opinion." *Stroehmann* v. *Mutual Life Ins. Co.*, 300 U. S. 435, 439. See also *Love* v. *Northwestern Mutual Life Ins. Co.*, 119 F. (2d) 251 (C. C. A., 5th); *Bernier* v. *Pacific Mutual Life Ins. Co. of Calif.*, 139 So. 631 (La. Sup. Ct.); *Ardoin* v. *Great Southern Life Ins. Co.*, 173 So. 114 (La. Sup. Ct.); and *Muse* v. *Metropolitan Life Ins. Co.*, 192

So. 75 (La. Sup. Ct.), all to the effect that if language of an insurance policy is ambiguous it is to be construed in favor of the insured.

CONCLUSION.

In view of the foregoing it is respectfully submitted that the petition for a writ of certiorari should be granted and that this Court should review the decision of the United States Circuit Court of Appeals for the Fifth Circuit and finally reverse it.

Respectfully submitted,

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